Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term, 1978

No. 78-914

BARBARA BARRETT,

Petitioner,

vs.

STATE MUTUAL LIFE ASSURANCE COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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In The

Supreme Court of the United States

October Term, 1978

No.

BARBARA BARRETT,

Petitioner,

vs.

STATE MUTUAL LIFE ASSURANCE COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

OPINIONS BELOW

The opinion of the Court of Appeals of the State of New York, decided May 31, 1978, appears in the Appendix hereto (1a). The motion for reargument or to amend the remittitur was denied on September 14, 1978. The decision in respect thereto appears in the Appendix (2a). The opinion and order of the Appellate Division, First Department, dated July 14, 1977 after the second trial appears in the Appendix (3a). The opinion and order dated July 30, 1976 of the trial court on the second trial appears in the Appendix (11a). The opinion of the Appellate Division, First Department, dated October 23, 1975, after the first trial, appears in the Appendix (13a).

JURISDICTION

The judgment or decision of the Court of Appeals of the State of New York was entered on May 31, 1978. A timely motion for reargument or to amend the remittitur was denied on September 14, 1978, and this petition for certiorari is filed within 90 days of the latter date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Where a jury's verdict in favor of plaintiff in the first trial is set aside on appeal for errors in the trial court's charge and the exclusion of evidence, and the appellate court (Appellate Division, First Department) states in its opinion that there are "factual issues for the jury to decide," and after retrial a jury renders its verdict again in favor of the plaintiff, may such second verdict be set aside by the same appellate court (Appellate Division, First Department), consisting of a different panel of judges and the Court of Appeals, and the action dismissed, where the evidence on both trials is substantially the same? Whether the setting aside of the jury's verdict and dismissal of the action after the second trial contravenes the constitutional right to a jury trial guaranteed by Article VII of the Amendments to the Constitution of the United States.

2. Whether the decision of the Appellate Division, First Department, after the second trial, which overruled the decision of the same Appellate Division, after the first trial, that the "factual issues were for the jury to decide," contravenes the "due process of law" and the "equal protection of the laws" provided by Article XIV of the Amendments to the Constitution of the United States.

3. Whether state courts, inclusive of the Court of Appeals, may disregard a constitutionally sound statute enacted by the

Legislature, to specifically overrule a Court of Appeals decision, and then decide the issues involved in the action contrary to the mandates of the statute and in accordance with such overruled decision.

4. Where the New York State Constitution limits the jurisdiction of the Court of Appeals in civil actions to a review of questions of law except where the Appellate Division, on reversing the final judgment in an action, finds new facts and a final order pursuant thereto is entered, may the Court of Appeals review questions of fact where the Appellate Division reversed on the law only, and a final order of reversal was entered by the Appellate Division on the law only?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article VII of the Amendments to the Constitution of the United States provides:

> "JURY TRIAL IN CIVIL CASES
>
> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law."

Article XIV of the Amendments to the Constitution of the United States states in part:

> "Section 1. CIVIL RIGHTS
>
> . . . nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Subdivisions 2 and 3 of Section 149 of the Insurance Law of the State of New York provide:

> "2. No misrepresentation shall avoid any contract of insurance or defeat recovery thereunder unless such misrepresentation was material. No misrepresentation shall be deemed material unless knowledge by the insurer of the facts misrepresented would have led to a refusal by the insurer to make such contract.
>
> 3. In determining the question of materiality, evidence of the practice of the insurer which made such contract with respect to the acceptance or rejection of similar risks shall be admissible."

Article 6, Section 3a of the New York State Constitution provides:

> "§3. Jurisdiction of court of appeals
>
> A. The jurisdiction of the court of appeals shall be limited to the review of questi of law except where the judgment is of death, or where the appellate division, on reversing or modifying a final or interlocutory judgment in an action or a final or interlocutory order in a special proceeding, finds new facts and a final judgment or a final order pursuant thereto is entered; . . . ."

STATEMENT OF THE CASE

Petitioner, Barbara Barrett, brought this action as the beneficiary of a life insurance policy issued on October 29, 1969, on the life of her husband, Joseph P. Barrett, to recover the sum of $20,000 from the respondent, State Mutual Life Assurance Company.

Defendant refused to pay the proceeds of the policy alleging material misrepresentations in the application.

The first trial resulted in a jury's verdict in favor of plaintiff. The verdict and judgment entered thereon were set aside and a new trial directed by the Appellate Division, First Department, for errors in the trial court's charge and in the exclusion of certain evidence, the appellate court stating significantly as follows:

> "Under these circumstances, whether Barrett's answers on the application for the policy were truthful or untruthful and, if untruthful, whether they constituted material misrepresentations as to any pre-existing hernia or heart condition, were essentially factual issues for the jury to decide."

Under this ruling a second jury trial was held which resulted in the second jury finding a verdict again for the plaintiff.

The trial court on the second trial denied respondent's motion to set aside the jury's verdict or for a mistrial, holding there "is no substantial change in the testimony in the two trials."

The same Appellate Division, First Department, but consisting of a different panel of judges, thereafter set aside the jury's verdict and dismissed the complaint, criticizing the decision of its court of coordinate jurisdiction, and holding that its decision was erroneous, as follows:

> "These errors effectively rendered the first trial a charade and a nullity, and, in reversing, the question of prima facie case was never truly passed on. It is not the law of this case that plaintiff heretofore [referring to the first trial] made a prima facie showing." (Bracketed material ours.)

The second Appellate Division dismissal was contrary to the first Appellate Division decision that the issues were for the jury, which had remanded the case for retrial. The Court of Appeals affirmed.

The respondent's physician, who examined the insured before the policy was issued, found the insured to be in perfect health. There was no finding of a heart irregularity. The insured had not complained of any chest pains, even with extensive activity, for a period of approximately five years before the issuance of the policy. Pain in the region of the chest, as is well-known, can sporadically occur for many reasons such as pain originating in the muscles or bones of the chest, hiatus hernia, neurological conditions, strenuous exercise, indigestion, etc. True angina pain keeps repeating itself after exertion, which did not occur in this case. This old, non-related symptom to heart disease was borne out by the medical testimony at both trials and from respondent's underwriting manuals. The insured's freedom from heart disease was further proven by the fact that after many years he died from cancer.

A grave injustice was done to petitioner by the setting aside of the second jury verdict in favor of the plaintiff. This contravened her rights to a jury trial of the factual issues guaranteed by Article VII of the Amendments to the Constitution of the United States.

The overruling of the prior decision of the first Appellate Division by the second Appellate Division (the same court but a different panel) that the issues in this case were for the jury and which was affirmed by the Court of Appeals further violated petitioner's right of "due process of law" and "the equal protection of the laws" guaranteed by Article XIV of the Amendments to the United States Constitution.

There was also applicable in this case a constitutionally enacted statute [Section 149, Insurance Law (1940)], overruling

a prior Court of Appeals decision [*Geer v. Union Mutual Life Ins. Co.*, 273 N.Y. 261 (1937)] which was not followed by the appellate courts, but which still adhered to this overruled decision.

The constitutional questions appear from petitioner's arguments in briefs before the appellate courts and are also particularly and specifically raised on petitioner's motion for reargument and to amend the remittitur of the Court of Appeals, which the court denied.

REASONS FOR GRANTING THE WRIT

I.

The decision below contravenes petitioner's constitutional right to a jury trial of the factual issues.

The jury and the trial judge on the second trial heard all the evidence adduced by petitioner and respondent, saw the witnesses and evaluated their testimony and credibility as to whether there was a material misrepresentation and whether defendant-respondent would have issued the policy. Under proper instructions set forth by the first Appellate Division after the first trial, as was precisely followed by the trial judge in instructing the second jury, a verdict in favor of the plaintiff was again found by another jury.

The setting aside of the jury's verdict and the dismissal of the case is in direct violation of the guaranteed constitutional right of the petitioner to trial by jury (Article VII of Amendments to the United States Constitution).

II.

The evidence in both trials was substantially the same.

The trial judge on the second trial, who saw and heard the witnesses, and who had examined the first trial record, and who was best qualified to do so, determined that the evidence in both trials was substantially the same. In denying respondent's motion to set aside the jury's verdict and for dismissal of the complaint, or for a new trial, at the end of the testimony, he stated as follows:

> "THE COURT: There's no such evidence in this record before me. I have followed this case carefully and I see that the evidence of this trial is substantially the same as it was at the first trial, and that the first trial went up to the Appellate Division and there was a reversal of the first trial. If they wanted it dismissed because of misrepresentations, they obviously could have done so in the Appellate Division saying that there had been no case proved. I find absolutely nothing substantially different.
>
> . . . I find that if the learned Appellate Division found that there wasn't a prima facie case, or that the complaint should have been dismissed either at the end of the plaintiff's case or at the end of the entire case at the last trial, they would have so decided in their decision on the appeal."

The said trial court's decision on a written motion made by respondent to set aside the jury's verdict and for dismissal of the complaint or for a new trial held:

> "The court finds that there is no substantial change in the testimony in the two trials except

> the court permitted the introduction of the evidence as directed by the Appellate Division."

The setting aside of the second jury's verdict and the dismissal of the case, therefore, is in direct violation of the guaranteed constitutional right of the petitioner to trial by jury (Article VII of Amendments to the United States Constitution).

III.

The overruling by the second Appellate Division of the decision of the first Appellate Division, a court of coordinate jurisdiction, was a violation of petitioner's constitutional rights of due process and equal protection of the laws (Article XIV of the Amendments to the United States Constitution).

The first Appellate Division held that there were triable issues for the jury to determine, after reviewing the evidence. The second Appellate Division, in effect, overruled this determination, holding that: "It is not the law of this case that plaintiff heretofore (referring to the first trial) made a *prima facie* showing," thus determining that the issues were not for the jury.

It is axiomatic that a court of coordinate jurisdiction may not reverse the ruling of a prior court. If it does, it is a violation of due process and equal protection of the laws, provided by the Fourteenth Amendment to the Constitution of the United States.

IV.

The state courts had no power to disregard and decide the issues contrary to the provisions of Section 149 of the Insurance Law (1940), a constitutionally sound statute.

The second Appellate Division in its opinion relied upon and cited the case of *Geer v. Union Mutual Life Insurance Co.*, 273 N.Y. 261 (decided in 1937), which determination was affirmed by the Court of Appeals. The majority opinion in the *Geer* case enunciated the "freedom of choice" rule, which was overruled by the New York Legislature by the enactment of Section 149 of the Insurance Law in 1940. Despite this, the second Appellate Division quoted the following language in its opinion which is contrary to the statute:

> "The major question is whether the company has been induced to accept an application which it might otherwise have refused (see *Geer v. Union Mutual Life Ins. Co.*, 273 N.Y. 261)."

By overruling the decision in *Geer*, through the enactment of Section 149 of the Insurance Law, the Legislature adopted the decision and reasoning of Judge Finch, stated and discussed in his dissenting opinion in *Geer*. The rule of "freedom of choice" as determined by the majority in *Geer* was supplanted by this legislative mandate.

No longer, because of the act of the Legislature in 1940, does a misrepresentation become material, as set forth by the majority in *Geer*, because the question is asked in the application under the so-called doctrine of "freedom of choice." It must, in fact, be material to the risk and the insurance company must additionally prove that they would not have issued the policy under its practices. These issues ordinarily, as determined by the first Appellate Division in our case, are for the jury.

Judge Finch, in his dissenting opinion in *Geer* (273 N.Y. 261, 275-277), which was adopted by the enactment of Section 149, commented, *inter alia,* as follows:

> "It is argued that where an insurance company by specific questions requests information, any untrue representation or concealment in the answer, however innocent, is material as a matter of law, and that the test is not whether the insurance company would have issued the policy if it had been apprised of the truth, but whether it had an opportunity to exercise its choice upon a disclosure of all the facts. . . .
>
> By asking the question, has it made the answer material as a matter of law? . . .
>
> A misrepresentation, as noted above, does not invalidate a policy unless it is material. . . .
>
> The contention that answers to questions in the application concerning health are material as a matter of law is based upon the theory that if an insurance company evinces interest in the subject it thereby becomes material. *That is not the true test.*" (Emphasis ours.)

The Legislature, by enacting Section 149 which remains the law, has overruled the courts which is its right. In any event, we submit, the Finch rule, as adopted by the Legislature, was far more fair and reasonable in a contest between an insured or beneficiary and their insurance company.

We now refer to more authoritative voices than ours, Judge Rippey, in *Glickman v. New York Life Insurance Company*, 291 N.Y. 45, 53-58, although he dissented on other points, had the

opportunity to review and comment upon the *Geer* case and the purpose of the enactment of Section 149 in the following language. Referring to the *Geer* case, he stated:

> "Notoriously, to overcome the legal effect of that and previous decisions, the Legislature enacted sections 149 and 150 of chapter 882 of the Laws of 1939. The purpose of the Legislature is not open to debate. The language used is clear and unambiguous. There is no field open for construction on the question under consideration. Whether a false representation or suppression of a fact for which information is requested by the insurer as a condition antecedent to the completion of a contract of insurance tends to diminish or increase the risk of loss and is material to the risk . . . are no longer questions of law for the court but are now questions of fact which must be determined as such under rules applicable to other cases where questions of fact arise. Unless the misrepresentation or suppression of a fact or breach of warranty, if any such occurs, by the insured is found, as a fact, to be material to the risk, recovery on the contract may no longer be avoided. In no case may it now be held that recovery on a policy of life insurance may be avoided by a mere false representation or misrepresentation of a fact or by the suppression of a fact called for in an application for an insurance policy, without more, whether it becomes by statutory definition a part of the ultimate contract or a 'warranty' or not. *No court has the right nor will it be presumed to undertake by any process of reasoning to nullify a mandate of the Legislature so clear and unequivocal for the sake of salvaging some previous decision that may be on the books.*" (Emphasis ours.)

To the same effect is *Giuliani v. Metropolitan Life Insurance Company,* 269 App. Div. 376. In *Giuliani* the court also historically discussed the background of Section 149 of the Insurance Law relating to the reason for the enactment of Section 149, including the overruling of *Geer* which we discussed and quoted from in our motion for reargument before the Court of Appeals at pages 20 and 21.

It is submitted that the judiciary cannot override an act of the Legislature "so clear and unequivocal," unless it was unconstitutional.

The "freedom of choice rule" adopted by the New York appellate courts, following the majority in the *Geer* case, meant a misrepresentation becomes material, if the answer to the question in the application is untruthful. It still would result in rescission, even if, inquiry by the company would have resulted in issuance of the policy. Furthermore, under the *Geer* decision, whatever proof as to practice by the insurance company is offered it, is not subject to the test of credibility by a jury. These rulings, following the discarded *Geer* case, have rendered nugatory the rights of beneficiaries in life insurance cases, including the plaintiff.

V.

The Court of Appeals of the State of New York lacked jurisdiction under the Constitution of the State of New York to review the facts, since the Appellate Division reversed on the law only.

The Constitution of the State of New York, under Article 6, Section 3a, grants jurisdiction to the Court of Appeals in civil cases to review questions of law, except where the Appellate Division reverses on facts, as well, finding new facts, and a final order pursuant thereto is entered. In the case at bar the second Appellate Division's reversal was on the law only. The Court of Appeals therefore lacked jurisdiction to review the facts herein.

Thus, it follows that questions of fact, the credibility of witnesses, the quality, persuasiveness and weight of the evidence are matters for the triers of facts, or the jury, and are beyond review by the Court of Appeals. The Court of Appeals determined here questions of fact prohibited by the Constitution of the State of New York.

In our case, the opinion of the second Appellate Division does not discuss any additional evidence but is a criticism of the evidence on the second trial. The sole basis of the reversal by the second Appellate Division was that a *prima facie* case in the first trial was not made.

The Court of Appeals could not therefore make such determination, constitutionally, because the Appellate Division had reversed only upon the law, nor can the Court of Appeals make a determination that defendant was entitled to a directed verdict on the merits, since this would entail going into and reversing the findings of facts by the jury.

CONCLUSION

We respectfully submit that this case is indeed unique and of great public importance in that two juries determined the issues in favor of the plaintiff and the second trial was based upon the direction of the Appellate Division that the issues were for a jury, concurred in by the two trial judges who saw and heard all the evidence. Nevertheless, the second Appellate Division, a court of coordinate jurisdiction, overruled the first Appellate Division and dismissed the action, and this determination was affirmed by the Court of Appeals.

It is also submitted that the state courts had no power to disregard a valid remedial statute enacted by the Legislature to supplant its prior determination in *Geer, supra.*

Finally, the Court of Appeals lacked jurisdiction to review the facts.

The setting aside of the jury's verdict, which was rendered in favor of the plaintiff for the second time, and a dismissal of the action, violated the time-honored constitutional right to trial by jury, and renders such right meaningless and worthless. The plaintiff beneficiary, upon the second trial, followed the rulings of the first Appellate Division, in a retrial of the issues before a second jury in this $20,000 life insurance case, consuming a great deal of time and effort in these two trials and these various appeals, and was successful for a second time before a jury, after painful and expensive litigation. Most citizens, in contrast with the insurance companies, could not, and would not, pursue, as here, their just rights. It is unfair and inequitable that all this should go for naught.

We respectfully urge that because of these determinations, not only are the rights of the citizenry generally constitutionally violated, but, particularly, the rights of insureds and their beneficiaries of life insurance in the State of New York, including this beneficiary, are nullified by what we respectfully submit are erroneous determinations. These constitutional questions, of right to trial by jury, due process and equal protection of the laws, we earnestly urge, deserve a review by this final tribunal.

For these reasons, we respectfully submit that a writ of certiorari should issue to review the decisions, orders and the opinions of the Court of Appeals of the State of New York.

Respectfully submitted,

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APPENDIX

OPINION OF COURT OF APPEALS DECIDED MAY 31, 1978

STATE OF NEW YORK
COURT OF APPEALS

No. 230

Barbara Barrett,

Appellant,

vs.

State Mutual Life Assurance Company,

Respondent.

(230) Samuel Sherman & Leon Wasserman, NYC, for appellant.

William E. Kelly & C. Robert Prianti, NYC, for respondent.

MEMORANDUM:

The order of the Appellate Division should be affirmed with costs. We agree that the Appellate Division was not bound by its earlier determination, as the law of the case, because of the additional and persuasive evidence on the second trial. On the merits we find that the defendant was entitled to a directed verdict for the reasons stated in the *Per Curiam* opinion at the Appellate Division (58 AD2d 320; see also, *Process Plants Corporation v. Beneficial National Life Ins. Co.*, 42 NY2d 928, aff'd, 53 AD2d 214).

* * *

Opinion of Court of Appeals Decided May 31, 1978

Order affirmed, with costs, in a memorandum. All concur.

Decided May 31, 1978

DECISION ON MOTION FOR REARGUMENT OR TO AMEND REMITTITUR DATED SEPTEMBER 14, 1978

Mo. No. 735

[SAME TITLE]

Motion for reargument denied with twenty dollars costs and necessary reproduction disbursements. Motion for alternative relief, treated as one to amend the remittitur to state that a Federal question was raised and necessarily passed upon, denied.

DECISION COURT OF APPEALS
SEP. 14, 1978

ORDER OF APPELLATE DIVISION DATED JULY 14, 1977

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on July 14, 1977.

Present—Hon. Harold Birns, Justice Presiding,
Herbert B. Evans
Louis J. Capozzoli
Arthur Markewich, Justices.

Barbara Barrett,

Plaintiff-Respondent,

-against-

State Mutual Life Assurance Company,

Defendant-Appellant.

456-57

Appeals having been taken to this Court by the defendant-appellant from a judgment of the Supreme Court, New York County (Smith, J.) entered on July 7, 1976 in favor of the plaintiff in the amount of $28,724.61 and from an order of said Court entered on July 30, 1976, denying defendant's motion to set aside the verdict, and said appeals having been argued by Mr. William E. Kelly of counsel for the appellant, and by Mr. Samuel W. Sherman of counsel for the respondent; and due deliberation having been had thereon, and upon the Per Curiam Opinion filed herein,

Order of Appellate Division Dated July 14, 1977

It is unanimously ordered that the judgment so appealed from be and the same is hereby reversed, on the law, vacated and the complaint dismissed without costs and without disbursements. The Clerk is directed to enter judgment in favor of the appellant dismissing the complaint. It is further unanimously ordered that the appeal from the order entered on July 30, 1976 be and the same hereby is dismissed as academic, without costs and without disbursements.

ENTER:

s/ Jerome L. Reinstein

OPINION OF APPELLATE DIVISION DATED MAY 1977

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

Harold Birns, J.P.
Herbert B. Evans
Louis J. Capozzoli
Arthur Markewich, JJ.

[SAME TITLE]

456-457

Separate appeals from a judgment of the Supreme Court, New York County (Smith, J.), entered on July 7, 1976, in favor of the plaintiff-respondent in the aggregate sum of $28,724.61, and from an order of said Court entered on July 30, 1976, denying defendant-appellant's motion to set aside the verdict.

William E. Kelly of counsel (Charles M. Pratt and C. Robert Prianti with him on the briefs; Casey, Lane & Mittendorf, attorneys) for defendant-appellant

Samuel W. Sherman of counsel (Leon Wasserman, attorney) for plaintiff-respondent.

PER CURIAM:

We here review a plaintiff's judgment following the second trial of this lawsuit after our remand for retrial (49 A D 2d 856). The subject of the suit and its basic issues are well stated in that memorandum opinion:

> "... Plaintiff, Barbara Barrett, brought this action as the beneficiary of a life insurance policy

on the life of her husband, Joseph F. Barrett (hereinafter 'Barrett'), to recover the sum of $20,000 from the defendant State Mutual Life Assurance Company. On October 7, 1969, Barrett executed Part I of the application for life insurance. He there agreed that defendant would not be liable on its policy unless the policy was delivered during his lifetime and sound health and then only if he has not consulted or been treated by any physician since the completion of Part II. On October 17, 1969, Barrett completed Part II. He there denied *inter alia*, (1) any history of chest pains or heart disease; (2) that he contemplated an operation; and (3) that he now smokes or has smoked within the preceding 12 months. After an examination by defendant's doctor, defendant was advised that Barrett was healthy. Barrett died in May, 1970 of cancer. Defendant refused to pay the proceeds of the policy alleging material misrepresentations in Part II and that the insured's health and insurability were not the same as described in Parts I, II and the smoking statement of the application . . . [pages 856-7]"

It is urged upon us that we may not consider defendant's arguments as to sufficiency of the evidence because we have heretofore impliedly held that plaintiff's case is prima facie sufficient in that our prior reversal of a judgment in plaintiff's favor remanded the cause for a new trial. Indeed, our memorandum opinion contains the now troublesome statement that " . . . whether Barrett's answers on the application for the policy were truthful or untruthful and, if untruthful, whether they constituted material misrepresentations as to any preexisting hernia or heart condition, were essentially factual issues for the jury to decide [prior appeal, page 857]." This

statement was, however, followed on the same page by the notation " . . . that the trial court improperly excluded evidence of defendant's underwriting practices . . . [and] erroneously charged, in effect, that an innocent misrepresentation as to the questions asked is not sufficient . . . " These errors effectively rendered the first trial a charade and a nullity and, in reversing, the question of prima facie case was never truly passed on. It is not the law of this case that plaintiff heretofore made a prima facie showing. In this regard, we distinguish *Politi v. Irvmar Realty Corp.* wherein a new trial had been ordered "solely on the ground that the verdict was against the weight of the credible evidence." [13 A D 2d 469]. Therefore, we may consider defendant's arguments as to sufficiency of the evidence. However, even if we had impliedly held that a prima facie case had been established on the first trial, there are "extraordinary circumstances" (*Politi*, page 469) which would here justify us in not considering that to be the law of the case. It must be recalled that our holding reversing the first trial's verdict effectively said that that case had been considered by the jury on an erroneously circumscribed record in the light of an incorrect instruction as to applicable law. Though this second trial was not exactly free of error, the record establishes to our satisfaction that defendant was entitled to a directed verdict on the entire case.

Plaintiff's case was presented by her own formal testimony establishing the insurance contract, payment of the premium, death of plaintiff's decedent, demand for and refusal of payment. The representations made by the decedent and set forth in the documents were as excerpted above from the opinion reversing the first verdict. On further examination by the defense, she admitted that her husband had, within five years preceding application for the policy, experienced symptoms usually associated with a heart condition and had consulted Dr. Davidoff concerning "chest throbs" and taken medication therefor prescribed by the doctor. Further, that during this time, he had been placed on a restricted diet by the doctor. Moving to

the defendant's case, Dr. Davidoff was called as defendant's witness and testified that shortly before the five year period, the decedent had consulted him for chest pains, diagnosed as angina pectoris, for which he had prescribed medication, inclusive of, in December, 1964, nitroglycerin. The condition was relieved by January, 1965, but he was consulted again in January, 1966, and again prescribed the nitro. Decedent underwent a hernia operation toward the end of 1969, at which time he gave the anesthesiologist a history: "53 year old male for right inguinal herniorrhaphy. Agrees to spinal anesthetic. History of A.S.H.D. [Arteriosclerotic Heart Disease] with angina pectoris. On Peritrate. EKG within normal limits." It is noted that the answers to defendant's questions included negative replies to questions as to whether, "within the past five years" he had had "pain or pressure in the chest" or had "ever been on a restricted diet" or "ever consulted or sought advice from a physician . . . for any reason not already mentioned." It is unnecessary to go further.

Quite obviously, the evidence demonstrates without contradiction that the decedent's answers were at variance with the facts. Further, these facts were patently material; indeed, it was part of defendant's evidence — correcting one of the first trial's errors — that, had defendant known the truth, the policy in evidence, whatever may have been done about a possible higher premium rate, would not have issued in the form found here.

> "It is the rule that even an innocent misrepresentation as to specific diseases or ailments, if material, is sufficient to allow the insurer to avoid the contract for insurance or to defeat recovery thereunder *(Eastern Dist. Piece Dye Works v. Travelers Ins. Co.*, 234 NY 441, 449-450; 30 NY Jur, Insurance, §§947, 949). Subdivision 2 of section 149 of the Insurance Law provides that '[n]o misrepresentation shall avoid any contract of insurance or defeat recovery thereunder unless such misrepresentation was material. No misrepresentation shall be deemed material unless knowledge by the insurer of the facts misrepresented would have led to a refusal by the insurer to make such contract.' Further, subdivision 4 of section 149 of the Insurance Law states that a misrepresentation that an applicant has not had previous medical treatment shall be deemed, for the purpose of determining its materiality, a misrepresentation that the applicant has not had the ailment for which treatment was given. Ordinarily, the question of materiality of misrepresentation is a question of fact for the jury. However, where the evidence concerning the materiality is clear and substantially uncontradicted, the matter is one of law for the court to determine. The test is whether failure to furnish a true answer defeats or seriously interferes with the exercise of the insurance company's right to accept or reject the application. The major question is whether the company has been induced to accept an application which it might otherwise have refused (see Geer v. Union Mut. Life Ins. Co., 273 NY 261). Applying the foregoing test to the instant facts, it is clear that the misrepresentation is material as a matter of law and that the complaint should have been dismissed. [*Process Plants Corp. v. Beneficial National Life Insurance Co.*, 53 A D 2d 214, 216-217]."

The case is directly in point, and its teaching dictates that, on the entire case, the defendant's motion for direction of verdict in its favor should have been granted.

Opinion of Appellate Division Dated May 1977

Were we not reversing and dismissing the complaint we would remand for two trial errors which, inter alia, prevented defendant from enjoying a fair trial. Decedent's physician, Dr. Davidoff, obviously an unwilling witness, was questioned by defense counsel as to the use of nitroglycerin for his patient. The court cut off an answer by observing that "the implication or inference therefrom is so obvious." That observation could mean only one thing, that the drug was used for heart problems. If that obvious, a verdict for defendant should have been directed; if not, then the answer should have been permitted. Again, Dr. Davidoff, who minimized the decedent's medical problems, testified that, about the time that his patient was in the hospital, he had prepared a record of his medical involvements, inclusive of "treatment for angina pectoris." Though the contradiction is obvious, the record was rejected as evidence.

Accordingly, the judgment for plaintiff, entered July 7, 1976, in Supreme Court, New York County, after trial to a jury (Smith, J.), should be reversed, on the law vacated, and the complaint dismissed, without costs. The appeal from the order denying defendant's motion to set aside the verdict should be dismissed, without costs, as academic.

All concur.

OPINION AND ORDER OF JUSTICE IRVING SMITH, DATED JULY 30, 1976, (1) DENYING DEFENDANT'S MOTION TO SET ASIDE THE VERDICT OR (2) FOR A NEW TRIAL

New York Supreme Court

County of New York

TRIAL TERM PART 17

INDEX NUMBER 7698-1973

PRESENT:

HON. IRVING SMITH
Justice.

BARBARA BARRETT

v

STATE MUTUAL LIFE INSURANCE

The following papers numbered 1 to #7 read on this motion Submitted this 30 day of July 1976

Calendar No	PAPERS NUMBERED
Notice of Motion and Affidavits Annexed	1-3
Answering Affidavits Answering affidavit received in Pt. 17	3
Replying Affidavits	4
Exhibits	5-6-7

Opinion and Order of Justice Irving Smith, Dated July 30, 1976, (1) Denying Defendant's Motion to Set Aside the Verdict or (2) For a New Trial

Upon the foregoing papers this motion is denied. The court finds that there is no substantial change in the testimony in the two trials except the court permitted the introduction of the evidence as directed by the Appellate Division.

The motion to set aside the verdict and dismissing the complaint or in the alternative directing a new trial because it is contrary the weight of evidence as denied.

FILED

JUL 30 1976
NEW YORK
CO. CLERK'S OFFICE

Dated: July 30, 1976

I.S.

J. S. C.

OPINION OF THE APPELLATE DIVISION, DATED OCTOBER 23, 1975, DIRECTING NEW TRIAL

Stevens, P.J., Murphy, Lupiano, Lane, Nunez, JJ.

1153 Barbara Barrett,

Plaintiff-Respondent, S.W. Sherman

- against -

State Mutual Life Assurance Company,

Defendant-Appellant. C.M. Pratt

Judgment, Supreme Court, New York County (Kaplan, J., and a jury), entered December 30, 1974, in favor of plaintiff, in an action brought to recover the proceeds of a policy of life insurance allegely issued to plaintiff's deceased husband, unanimously reversed, on the law and the facts, and a new trial directed with $60 costs and disbursements to abide the event.

Plaintiff, Barbara Barrett, brought this action as the beneficiary of a life insurance policy on the life of her husband, Joseph F. Barrett (hereinafter "Barrett"), to recover the sum of $20,000 from the defendant State Mutual Life Assurance Company. On October 7, 1969, Barrett executed Part I of the application for life insurance. He there agreed that defendant would not be liable on its policy unless the policy was delivered during his lifetime and sound health and then only if he has not consulted or been treated by any physician since the completion of Part II. On October 17, 1969, Barrett completed Part II. He there denied, *inter alia*, (1) any history of chest pains or heart disease; (2) that he contemplated an operation; and (3) that he now smokes or has smoked within the preceding twelve months. After an examination by defendant's doctor, defendant was advised that Barrett was healthy. Barrett died in May, 1970 of cancer. Defendant refused to pay the proceeds of the policy

alleging material misrepresentations in Part II and that the insured's health and insurability were not the same as described in Parts I, II and the Smoking Statement of the application.

At trial, testimony was introduced tending to show that Barrett, in 1964, suffered from some sort of coronary insufficiency, perhaps angina pectoris, and that Barrett had been hospitalized in December, 1969 for the repair of a hernia which had been diagnosed in early October, 1969. Further testimony was elicited tending to show that in 1966 there was no further evidence of heart disease and that it could not be stated with medical certainty that Barrett had heart trouble or heart disease in 1964. Under these circumstances, whether Barrett's answers on the application for the policy were truthful or untruthful and, if untruthful, whether they constituted material misrepresentation as to any pre-existing hernia or heart condition, were essentially factual issues for the jury to decide. It is noted that the trial court improperly excluded evidence of defendant's underwriting practices by restricting defendant solely to the introduction of the underwriting manual (See Insurance Law §149[3]; *Orenstein v. Metropolitan Life Insurance Company,* 18 A.D.2d 1016 [2nd Dept., 1963]). Further, the trial court erroneously charged, in effect, that an innocent misrepresentation as to the questions asked is not sufficient, but that Barrett must not only have had the conditions, he must have known he had those conditions in order to enable defendant to avoid the policy. It is well recognized that "the statutory provisions relating to misrepresentations have not changed the previous New York case law to the effect that an innocent material misrepresentation of fact is a sufficient ground of avoidance" (30 N.Y. Jur, Insurance §947; See Insurance Law §149; *E.D.P. Dye Works v. Travelers Ins. Co.,* 234 N.Y. 441 [1923]).

Finally, defendant's contention that its first affirmative defense seeking rescission is equitable and should be tried by the court above is without merit. "After the death of the insured in a life policy, a court of equity should not take jurisdiction of a bill to secure the cancellation of the policy for fraud practiced in procuring its issuance, because the company *then* has an adequate remedy at law, in that it may set up the fraud in defense to any action brought on the policy" (*Equitable Life Assurance Society v. Kushman,* 276 N.Y. 173, 182 [1937], citing Black on Rescission and Cancellation [Vol. 3, p. 1569, §652]) (Emphasis supplied).

Order filed.

Supreme Court, U. S.
FILED
JAN 5 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-914

BARBARA BARRETT,

Petitioner,

vs.

STATE MUTUAL LIFE ASSURANCE COMPANY,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-914

BARBARA BARRETT,

Petitioner,

vs.

STATE MUTUAL LIFE ASSURANCE COMPANY,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Statutory and Other Provisions Involved

(1) Rule 23(f) of the Rules of this Court provides as follows:

> "(f) If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings in the court of first instance and in the appellate court, at which,

and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them (e.g., by a pleading, by request to charge and exceptions, by assignment of error); and the way in which they were passed upon by the court; such pertinent quotations of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (e.g., ruling on exception, portion of the court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari.

Where the portions of the record relied upon under this subparagraph are voluminous, then they shall be included in an appendix to the petition, which may, if more convenient, be separately presented."

(2) 28 U.S.C. §1257(3) provides as follows:

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

* * *

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

Questions Presented

1. May a writ of certiorari be sought to review a final state court decision where no federal question was raised until a motion to reargue was made in the state's highest court?

2. Does the Supreme Court have jurisdiction to review a state court's interpretation of a state statute when it is conceded that the statute is not repugnant to the Constitution, treaties or laws of the United States?

Statement of the Case

In 1969 Joseph Barrett ("Barrett") obtained a life insurance policy from State Mutual Life Assurance Company of America ("respondent") by completing a written application to respondent purporting to detail his material health history. Barrett agreed in his application that the policy applied for would not take effect unless certain conditions precedent concerning his health and consultations with doctors were satisfied. Following Barrett's death in May 1970, seven months after the issuance of the policy, respondent discovered that Barrett had not fully disclosed his health history in his application for insurance and that he had not satisfied the conditions precedent. A trial was had and the jury returned a verdict for petitioner. An appeal was taken and the Appellate Division, First Department of the Supreme Court of the State of New York vacated the judgment on the law and the facts and ordered a new trial (Pet. Br. 13a) because of the numerous errors committed by Trial Term (Pet. Br. 14a).

A second trial was had and the evidence, despite petitioner's assertions to the contrary (Pet. Br. 8), was sub-

stantially more favorable to respondent than that presented at the first trial. The Appellate Division, in its opinion on the first appeal (Pet. Br. 13a-15a), summarized certain of the pertinent evidence at the first trial including the fact that in 1964 the insured suffered from coronary insufficiency, and perhaps angina pectoris. In addition, the Appellate Division noted (1) that "testimony was elicited tending to show that in 1966 there was no further evidence of heart disease" and (2) "that it could not be stated with medical certainty that Barrett had heart trouble or heart disease in 1964". On this basis, it was established on the first appeal that issues of fact existed with regard to the existence of a misrepresentation and the materiality of any such misrepresentation (Pet. Br. 13a, 14a).

The evidence at the second trial, by way of contrast, established as a matter of law that Barrett made material misrepresentations in his application for insurance. Petitioner conceded at the second trial, for the first time, that the insured had consulted a physician, Doctor Davidoff, for a "throbbing" in his chest (R* 39) for which the doctor prescribed both peritrate and, subsequently, nitroglycerin (R 44). Thus petitioner conceded, at the second trial, that the insured suffered from chest pains which were sufficiently serious to lead him to consult Doctor Davidoff from whom he obtained prescriptions for two cardiac medicines which were not disclosed to respondent in the application for insurance.

At the first trial evidence was offered "that in 1966 there was no further evidence of heart disease" (Pet. Br. 14a) while at the second trial it was established, for the

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* References in parentheses to "R" refer to pages of the Record on Appeal filed with the New York State Court of Appeals, the relevant pages of which are annexed hereto as an appendix.

first time and so clearly that Trial Term refused to permit respondent to introduce further evidence on the issue (R 110), that in 1966 the insured was instructed by Doctor Davidoff to continue to carry nitroglycerin and peritrate with him (R 110) in order to relieve his continuing angina pectoris and coronary insufficiency (R 110).

At the first trial Dr. Davidoff testified, as noted by the Appellate Division in its opinion on the first appeal, "that it could not be stated with medical certainty that the insured had heart trouble or heart disease in 1964" (Pet. Br. 14a) while at the second trial he testified unequivocally that an exercise EKG test in 1964 showed that the insured had coronary insufficiency (R 76-77).

Doctor Davidoff also testified at the first trial that his prescription of peritrate and nitroglycerin was precautionary only (R 38a) and simply "prophylactic" (R 38a). This testimony, which was obviously misleading, was not repeated at the second trial. On the contrary, Doctor Davidoff testified at the second trial that the nitroglycerin prescription was designed to relieve immediate attacks of chest pains (R 199). He testified, with respect to the prescription for peritrate, that it was given to eliminate the insured's chest pains (R 197) and that his direction to Barrett to take the Master's two-step EKG test was an attempt to ascertain the cause of those pains. Doctor Davidoff further testified that the results of the exercise EKG were not normal (R 200) and that the results led him to take more precautions and to treat Barrett for a heart condition (R 201).

Although the evidence at the second trial unequivocally demonstrated that Barrett grossly misrepresented his material health history in his application for insurance, the jury returned a verdict for petitioner and when Trial Term refused to direct a verdict in respondent's favor an

appeal was again taken. On the second appeal the Appellate Division found that the evidence conclusively established that Barrett made misrepresentations in his application for insurance (Pet. Br. 8a), that the misrepresentations were material as a matter of law, and that respondent was entitled to a directed verdict (Pet. Br. 9a). Petitioner moved for reargument in the Appellate Division but that motion was denied. Petitioner appealed to the New York State Court of Appeals which unanimously affirmed the judgment in respondent's favor (Pet. Br. 1a, 2a) and denied petitioner's subsequent motion for reargument (Pet. Br. 2a).

POINT I

This Court Lacks Jurisdiction To Consider The Arguments Raised In Petitioner's Brief.

Rule 23(f) of the Rules of this Court (p. 1 *supra*) requires a petitioner seeking a writ of certiorari to a state court to show that the federal questions on which review is sought were properly and timely raised in the state courts in order to give this Court jurisdiction. No federal questions were raised in the two trials, in the two appeals to the Appellate Division or in petitioner's appeal to the New York Court of Appeals. It was not until petitioner moved for reargument in the Court of Appeals that she attempted to raise Constitutional issues by asking the court, in the alternative, "for leave to appeal upon constitutional grounds to the United States Supreme Court." In denying petitioner's request for alternative relief, the New York Court of Appeals made it clear that no federal questions had been raised or passed upon:

> "Motion for alternative relief, treated as one to amend the remittitur to state that a Federal question was raised and necessarily passed upon, denied." (Pet. Br. 2a).

This Court has refused to consider Constitutional questions raised for the first time on a motion to reargue in a state court. As stated in *Forbes* v. *State Council of Virginia*, 216 U.S. 396, 399 (1910):

> "It has been many times held in this court that an attempt to introduce a Federal question into the record for the first time by a petition for rehearing is too late. *Loeber* v. *Schroeder*, 149 U.S. 580, 585; *Pim* v. *St. Louis*, 165 U.S. 273.
>
> There is an exception to this rule when it appears that the court below entertained the motion for rehearing, and passed upon the Federal question. But it must appear that such Federal question was in fact passed upon in considering the motion for rehearing; if not, the general rule applies. *Mallett* v. *North Carolina*, 181 U.S. 589; *Leigh* v. *Green*, 193 U.S. 79; *Corkran Oil Co.* v. *Arnaudet*, 199 U.S. 182; *McMillen* v. *Ferrum*, 197 U.S. 343; *Waters-Pierce Oil Co.* v. *Texas*, 212 U.S. 112, 118."

Since the exception to the general rule mentioned in *Forbes* v. *State Council of Virginia*, *supra*, cannot apply in this instance, petitioner's request for a writ of certiorari should be denied.

Moreover, this Court also lacks jurisdiction to consider the matters raised in Points IV and V of petitioner's brief. In Point IV of her brief (Pet. Br. 10) petitioner argues that the appellate decisions herein violated Section 149 of the New York Insurance Law. Petitioner raised and briefed that argument before the New York Court of

Appeals which unanimously affirmed judgment in favor of respondent and subsequently denied petitioner's motion for reargument. Petitioner now seeks to have this Court consider the same argument even though, as will be demonstrated, it lacks jurisdiction to do so.

Petitioner invokes this Court's jurisdiction (Pet. Br. 2) under 28 U.S.C. Section 1257(3) which, *inter alia,* specifies that a judgment from the highest court of a state may be reviewed by writ of certiorari ". . . where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States . . .". Petitioner however, does not allege that Section 149 of the New York Insurance Law is unconstitutional. Rather, petitioner candidly admits (Pet. Br. 10) that Section 149 is "a constitutionally sound statute". Thus, this Court lacks jurisdiction to consider petitioner's arguments.

Point V of petitioner's brief (Pet. Br. 13) is based on the allegation that the New York Court of Appeals lacked jurisdiction, under the New York State Constitution, to affirm the judgment in respondent's favor because, "the Court of Appeals determined here questions of fact" (Pet. Br. 14). An alleged violation of a state constitution or a state statute, however, is not within the jurisdictional parameters of this Court under Section 1257(3) or any other statute. Furthermore, even if this Court has jurisdiction, petitioner's contention that the New York Court of Appeals determined questions of fact is incorrect because that court merely affirmed the decision of the Appellate Division which granted judgment in favor of respondent.

POINT II

There Is No Federally Guaranteed Right To Trial By Jury In A Civil Action In State Court As Asserted In Points I And II Of Petitioner's Brief.

The established rule since the decision in *Walker* v. *Sauvinet,* 92 U.S. 90 (1875), has been that the Seventh Amendment right to a trial by jury "in suits at common law" does not apply in civil actions in state court:

> "The states, so far as this amendment is concerned, are left to regulate trials in their own courts in their own way. A trial by jury in suits at common law pending in the State courts is not, therefore, a privilege or immunity of National citizenship, which the States are forbidden by the Fourteenth Amendment to abridge. A State cannot deprive a person of his property without due process of law; but this does not necessarily imply that all trials in the State courts affecting the property of persons must be by jury. This requirement of the Constitution is met if the trial is had according to the settled course of judicial proceedings." *Id.* at 92, 93.

Subsequent decisions indicate that the principle enunciated in *Walker* v. *Sauvinet, supra,* has endured the test of time. See, e.g., *Alexander* v. *Virginia,* 413 U.S. 836 (1973). In light of the foregoing authorities, petitioner's assertion that she has been deprived, in a civil state court action, of a "Constitutional right" to trial by jury is inapposite.

POINT III

Point III Of Petitioner's Brief Is Without Merit.

In Point III of her brief (Pet. Br. 9) petitioner asserts that the Appellate Division, on the second appeal, reversed itself in holding that petitioner had not made out a *prima facie* case at the first trial. Petitioner unsuccessfully made that argument to the Appellate Division twice before, once in her answering brief on the second appeal and again on her motion to reargue that appeal. In rejecting petitioner's argument, the Appellate Division correctly observed that the question of whether petitioner established a *prima facie* case was never raised or considered on the first appeal since the case was sent back for a second trial solely because of the errors committed by Trial Term. In discussing the first trial, the Appellate Division stated:

> "These errors effectively rendered the first trial a charade and a nullity and, in reversing, the question of prima facie case was never truely passed on. It is not the law of this case that plaintiff heretofore made a prima facie showing." (Pet. Br. 7a)

The Appellate Division's ruling is consistent with its order on the first appeal where it held:

> "It is unanimously ordered that the judgment so appealed from be and the same [is] hereby reversed, on the law and the facts, and vacated, and a new trial directed. . . ." (R 27a)

It is well settled under New York law that the effect of such an order is to render the first trial a complete nullity and that, upon a succeeding trial, every issue of fact or law must be litigated anew, *Halpern* v. *Amtorg Trading Corp.*, 292 N.Y. 42, 47, 53 N.E.2d 758 (1944); *Gugel* v. *Hiscox*, 216 N.Y. 145, 152, 110 N.E. 499 (1915); *Ga Nun* v. *Palmer*, 216 N.Y. 603, 612, 111 N.E. 223 (1916).

Petitioner is likewise incorrect in asserting that she has been deprived of due process and equal protection of the laws, (Pet. Br. 9). As this Court observed in *Mathews* v. *Eldridge*, 424 U.S. 319, 333 (1976):

> "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.' *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965). See *Grannis* v. *Ordean*, 234 U.S. 385, 394 (1914)."

See also *Mitchell* v. *W.T. Grant Co.*, 416 U.S. 600 (1974).

Petitioner in the instant case has been accorded more than an adequate opportunity to be heard. She has initiated two motions to reargue and two appeals, all of which were denied, with both appeals being decided unanimously in respondent's favor. Petitioner makes no claim of an inadequate opportunity to be heard; indeed, she could not reasonably raise such a claim under the circumstances of this case and her claim of denial of due process is, therefore, patently without merit.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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C. ROBERT PRIANTI
ROBERT CLARY

Appendix Consisting of Relevant Pages of the Record on Appeal

Page numbers appearing in parentheses are the original page numbers used in the record on appeal.

Order of the Appellate Division, dated October 23, 1975, in Favor of Defendant and Direct a New Trial

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on October 23, 1975.

Present—Hon. Harold A. Stevens, Presiding Justice,
Francis T. Murphy, Jr.,
Vincent A. Lupiano,
Myles J. Lane,
Emilio Nunez, Justices.

Barbara Barrett,

Plaintiff-Respondent,
—against— 1153

State Mutual Life Assurance Company,

Defendant-Appellant.

An appeal having been taken to this Court by the defendant-appellant from a judgment of the Supreme Court, New York County (Kaplan, J.), entered on December 30, 1974, in favor of plaintiff against defendant in the total amount of $25,928.00, and said appeal having been argued by Mr. Charles Pratt of counsel for the appellant, and by Mr. Samuel W. Sherman of counsel for the respondent; and due deliberation having been had thereon, and upon the memorandum decision of this Court filed herein.

It is unanimously ordered that the judgment so appealed from be and the same hereby reversed, on the law and the facts, and vacated, and a new trial directed with $60 costs and disbursements to abide the event.

ENTER:

HYMAN W. GAMSO
Clerk

(27a)

Affidavit of Charles M. Pratt, dated July 16, 1976, in Support of Defendant's Motion for (1) an Order Setting Aside the Verdict and (2) a Directed Verdict in Favor of Defendant

At the first trial Dr. Davidoff testified that his prescription of Peritrate and nitroglycerin for Barrett were precautionary only. (Record 94-95*). In fact, the trial judge obtained the statement from Dr. Davidoff, at the first trial, that these prescriptions were "prophylactic" (Record 94-95). At the second trial, on the contrary, plaintiff's repeated efforts to get Dr. Davidoff to repeat this testimony were unavailing. Dr. Davidoff testified at the second trial that he had given Peritrate to Barrett to control his experience of chest pains and to prevent their recurrence. He also refused to state that the prescription of nitroglycerin for Barrett was precautionary and again stated that it was to control Barrett's symptoms of immediate pain due to angina pectoris.

At the first trial, plaintiff obtained the statement from Dr. Davidoff that he now, in hind sight, believed that Barrett had had no heart trouble. At the second trial Dr. Davidoff's revision of his medical opinion to make it more favorable to plaintiff than as it was originally reported in his records, was considerably more limited than at the first trial. Dr. Davidoff testified simply that Barrett has no

*References to the "Record" refer to the record on appeal following the first trial.

(38a)

A. Mr. Davidoff.

Q. Is it the same Dr. Davidoff sitting in the back of the courtroom today?

A. That's right.

Q. Do you know when your husband was directed to go on a diet?

A. Latter part of '64.

Q. Did your husband have any—I'll withdraw that.

Had your husband consulted Dr. Davidoff on one or more occasions in this period of 1964 when he was told to go on a diet?

A. Yes.

Q. Had your husband had any physical complaints that led him to consult Dr. Davidoff during this time, November, December 1964?

A. Yes.

Q. What physical complaints did he have?

A. Well, he had bronchitis, cold in his chest, and he had this throbbing feeling in his chest.

Q. Do you recall if your husband had a chest distress of some variety during this period November, December 1964?

The Court: Counselor, she just testified

for that particular medication?

The Witness: Yes.

The Court: You may proceed, Counselor.

Q. And this was given by Dr. Davidoff in December of 1964?

A. Yes.

Q. And did your husband carry with him these nitroglycerin pills?

Mr. Sherman: Object to this unless time is specified. This is five years before.

Q. Let me ask you—

The Court: Just one minute.

Gentlemen, do not enter into this colloquy.

The objection is overruled.

Do you know whether your husband carried this nitroglycerine with him after he received the prescription?

The Witness: I really don't recall.

Q. Do you know if your husband received a prescription for a drug called Peritrate in December of 1964?

A. Yes.

The Court: How do you spell that, Counsel?

Mr. Pratt: P-e-r-i-t—

Mr. Pratt: I now seek to give it to him for a different purpose.

The Court: Sir, do not seek it in this emphatic manner in my court. Just show him for the purposes of refreshing his recollection. That's the purpose you gave it to him in the first place.

(Document handed to the witness)

Q. When you say the Masters' two-step exercise test were positive, can you tell us what that means?

Mr. Sherman: Just a minute.

I object to counsel repeating the witness' testimony.

The Court: The objection is overruled. It's merely a preliminary question.

A. What's the question again?

The Court: Mr. Reporter, will you please repeat the question.

(The question was read back by the Court Reporter.)

A. It means that the findings upon the test which were electrocardiographic could indicate that the—could indicate that there was some insufficiency under stress.

Q. Is that coronary insufficiency?

A. Coronary insufficiency under stress.

Q. Did you receive a report, a formal report from the testing agency for this Masters' two-step test?

A. Yes, I did.

Q. Do you have that report with you today?

A. I do not.

Q. Do you have it in your possession back in your office?

A. I can't find it.

Q. Now, on November 19th did Mr. Barrett have any complaints, physical complaints?

A. No, he had no physical complaints.

Mr. Sherman: Excuse me.

What year are you talking about?

Mr. Pratt: Talking about 1964.

The Court: You may proceed, counsel.

Q. Is angina pectoris, the syndrome you mentioned earlier, a symptom of the coronary insufficiency?

Mr. Sherman: Object to this as calling for expert testimony.

The Court: The objection is sustained.

Q. Now, can you make—did you make—I believe your testimony was you made a diagnosis on November 19,

Counsel, we have gone into this at great length yesterday. Let's not start this case over from the beginning.

Mr. Pratt: Your Honor, I don't want to argue with you.

May I approach the bench?

The Court: No. Obviously he said what symptoms he had yesterday, and that based on these symptoms he told him to carry those drugs. Now the implication or inference therefrom is so obvious.

Mr. Pratt: All right. I understand, Judge.

The Court: He didn't tell him to carry these drugs with him because they were amusing to look at.

Let's proceed.

By Mr. Pratt:

Q. Did there come an occasion after January of 1966 when Mr. Barrett consulted you?

A. He was seen by me in November, about mid-November.

The Court: Of 1966?

The Witness: Of 1966—rather, 1969, it

Q. You weren't sure even on that date that he had a heart condition, were you?

A. I wasn't certain, no.

Q. Could that Peritrate do him any harm, assuming he had no heart condition?

A. It would not.

Q. It's a precautionary measure?

A. It was given with respect to an attempt to eliminate the pains which he was having, to see what effect it would have.

Q. That he was previously complaining to you about?

A. Yes.

Q. Now the next time you saw him was what date? Was that December?

A. December 5th.

Q. 1964?

A. Yes.

Q. And at that time his weight was 182?

A. His weight was down to 182.

Q. And his blood pressure was high or low, or normal?

A. It was normal.

The Court: This is cross-examination, and on cross-examination he may lead the witness. The objection is overruled.

Mr. Pratt: That is not my objection.

The Court: Your objection is overruled.

Please repeat the question.

Q. That was a precautionary measure?

A. It was.

The Court: The answer is just yes or no. Was it a precautionary measure?

The Witness: Do I have to answer it yes or no?

The Court: No.

The Witness: It was given with respect to relieve any immediate attack of pain which he might have had.

Q. Might have in the future?

A. Yes.

Q. He didn't tell he experienced violent pains?

A. He didn't tell me that he had experienced violent pains.

Q. So this was really a precaution for the future?

A. Yes; in case he had pain, he was to take medication for it to relieve the pain. It has a fast-acting effect. It may act in minutes rather than, say, prevent an attack of pain over hours.

Q. Now, Doctor, you testified that the two-step test, the report that came back to you was positive; is that right?

A. That's right.

Q. In other words, it wasn't the normal indication?

A. It was not a normal test.

Q. Now when did that test come back to you? Do you remember the date?

A. I have made a note of the report on November 19, 1964.

Q. Now, is a positive two-step test conclusive?

A. No.

Q. Is it conclusive?

A. No, sir.

Q. In other words, does it indicate positively that the man has a heart condition?

A. No, sir.

Q. Is there such a thing as a false positive:

in other words, the test may be erroneous?

A. That's right.

Q. In other words, the same person can take the same test later, and it is negative; is that right?

A. That's right.

Q. And even on the very same day, such a test can be given and it shows an opposite result?

A. I don't know—

Q. Or it may—

A. I can't say whether or not it will do it on the same day; it depends possibly on the technique as well.

Q. I see. Now when you got back your result of the test, were you certain as to whether this man had a true angina pectoris or whether he had a heart condition?

A. I couldn't be certain, but it would lean me a little to take more precautions and treat him for such a condition.

Q. Did you order electrocardiograms of this chest area on any of these tests?

A. Electrocardiograms are done during the test.